

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 21, 2013

v

MANTREASE DATRELL-DEQUAN SMART,
Defendant-Appellant.

No. 307511
Genesee Circuit Court
LC No. 10-027149-FC

Before: MURRAY, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to serve concurrent prison terms of 10 to 25 years for the armed-robbery and carjacking convictions, and a consecutive and preceding prison term of two years for the felony-firearm conviction. Defendant appeals as of right, arguing that the trial court erred by prohibiting him from testifying despite his request to do so. We conclude that the trial court denied defendant his constitutional right to testify. Accordingly, we reverse defendant's convictions and remand for a new trial.

Whether a defendant was denied his right to testify is a question of constitutional law that this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The Fifth, Sixth, and Fourteenth Amendments of the United States Constitution afford a criminal defendant the right to testify in his own defense. *Rock v Arkansas*, 483 US 44, 51-53; 107 S Ct 2704; 97 L Ed 2d 37 (1987). "There is no justification today for a rule that denies an accused the opportunity to offer his own testimony." *Id.* at 52. "Although counsel must advise a defendant of this right, the ultimate decision whether to testify at trial remains with the defendant." *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). Thus, it follows that "[i]f the accused expresses a wish to testify at trial, the trial court must grant the request, even over counsel's objection." *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). However, denial of this right does not require automatic reversal. *People v Solomon*, 220 Mich App 527, 535, 538; 560 NW2d 651 (1996). Rather, the denial of a

defendant's right to testify is subject to a harmless-error analysis. *Id.* at 538.¹ “[T]he prosecution bears a heavy burden to show that the error was harmless beyond a reasonable doubt in light of the uncertain effect of the defendant’s testimony on the jury.” *Id.*

On the second day of trial, after the prosecution rested its case, the trial court advised defendant about his constitutional right to testify and the risks associated with that right. Defense counsel stated that, in his opinion, defendant should not testify. When asked whether that was defendant’s plan, defendant stated, “I guess so.” With that, the trial court adjourned the proceedings for the day.

At the start of the third day of trial, defense counsel moved to permit the testimony of a potential alibi witness for defendant, whose existence allegedly was not brought to defense counsel’s attention until after the second day of trial. The trial court heard the potential testimony of the witness, and following a lengthy discussion, it decided not to permit the witness to testify. However, the trial court informed defendant that he still had the right to choose whether he wanted to testify. The trial court stated, “It is still your choice alone. If you choose not to testify, then, we’re going to go into closing arguments.” Rather than answer the trial court, defendant began discussing issues that he had with the trial court’s decision regarding the alibi witness and defense counsel’s performance. Defendant became argumentative and was briefly removed from the courtroom so that the deputies could place a security device in the event he had an outburst. Upon his return, defense counsel expressed his concern about defendant’s presence during the remainder of the trial. Defense counsel was worried that defendant would act out in front of the jury and the electronic monitoring system would go off and taint the jury’s view of defendant. However, the trial court responded by instructing defendant that it was his choice whether to stay, to which defendant responded, “I’m going to testify. Yes, sir, I say I want to testify. That’s it. That’s it.” The following conversation then proceeded:

The Court: Now, you do want to testify?

[*The Defendant*]: Yeah. I say I want. Anything else, I ain’t tripping on nobody.

[*Defense Counsel*]: Judge, I thought we were past that and we were going to final argument?

[*The Defendant*]: I want to testify, man. It’s my decision, you see. You trying not to let me testify, man.

¹ Previously, this Court held that “[i]f the record shows that the trial court prevented defendant from testifying, we will not hesitate to reverse its judgment.” *Simmons*, 140 Mich App at 685. However, we are bound by the rule of law established in *Solomon* because it was decided after November 1, 1990. MCR 7.215(J)(1).

[*Defense Counsel*]: Judge, it—the—ultimately the decision is Mr. Smart's. I only give counsel. And my counsel has always been to not testify. That there is nothing to be gained by him testifying. His statement is on the record from Detective—or from Lieutenant Shanlian.

[*The Prosecution*]: If he's going to testify, can we get a copy of that plea from your Court staff, so that we can use that to cross-examine?

[*Defense Counsel*]: As I said, Judge, a few moments ago, Mr. Smart pled guilty before this Court. And if he testifies, the Prosecution's going to be allowed to play in his statement where he said he had a gun and he committed this offense. That is absolutely—I will—he is going to destroy everything I've—he's going to destroy his defense if he does that.

I'm asking the Court to not allow him to testify. You've already closed the cases and you're about to bring the jury in. I do not want his testimony that he pled guilty brought before the Court.

The Court: Ultimately, the lawyer decides the strategy in the defense.

[*Defense Counsel*]: Judge, he's not testifying, then. I don't care if he grieves me. I am not going to let this man testify. Not after he's pled guilty to everything before this Court and then withdrawing his plea.

The Court: Then, it will not happen.

Subsequently, defense counsel rested his case and closing argument began.

The trial court erred by denying defendant his right to testify. Defendant clearly stated that he wished to testify. Although defense counsel opposed defendant's decision, it was not his decision to make. The trial court was required to grant defendant's request to testify, even over defense counsel's objection. Further, failure to grant defendant's request was not harmless error. We cannot say that this is one of those "relatively rare instance[s] in which the reviewing court can confidently assert that the denial of the right to testify was so insignificant as to constitute harmless error beyond a reasonable doubt." *Solomon*, 220 Mich App at 539. Unlike the evidence presented in *Solomon*, the evidence against defendant was not so overwhelming such that defendant's testimony could not have altered the verdict. *Id.* at 538-539. The only eyewitness was the victim, and he testified that it was dark out at the time. Although the area was lit, he also told the 9-1-1 dispatcher that he was robbed by two men wearing dark hats and hoodies. There were no other witnesses who saw defendant rob the victim, and the police were unable to collect or identify physical evidence of defendant's guilt. Further, the other two witnesses the prosecution presented were alleged co-conspirators who entered into a favorable plea agreement in exchange for their testimony. Both of them claimed to have seen the victim's car in the parking lot where they met defendant after the incident occurred, but neither one of them actually saw defendant rob the victim. One of these witnesses also testified that the other man who participated in the robbery told her that defendant never had or used a gun during the robbery. In addition, there seemed to be some confusion as to the victim's accuracy in identifying defendant in the photo and physical lineups. The police officer conducting the photo

lineup testified that the photos were old and the victim appeared to have uncertainty when he identify defendant's photo. The police officer testified that the victim was able to identify defendant as soon as the curtains were opened during the physical lineup, but later admitted that the victim thought the robber could have been either number three or five. Finally, defendant insisted that he had an alibi. Because the evidence against defendant was not overwhelming, it is possible that defendant could have offered sincere and convincing testimony that could have affected the jury's determination of guilt. *Id.* at 539. Therefore, we cannot find beyond a reasonable doubt that the denial of defendant's right to testify was harmless error.

Additionally, defendant argues that the trial court erred by instructing the jurors that they could discuss the case among themselves throughout the trial and before formal deliberations. However, this argument is moot because our decision to reverse defendant's conviction and remand for a new trial afforded defendant the relief that he requested, which makes it impossible to grant further relief to defendant. See *People v Billings*, 283 Mich App 538, 548; 770 NW2d 893 (2009). Nevertheless, we will briefly address the issue to advise the trial court on remand.

This unpreserved claim is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Under this standard, defendant is required to show prejudice, that the error affected the outcome of the lower court proceedings. *Id.* at 763. It is true that the trial court's instruction allowing the jurors to discuss the case among themselves in the jury room during recesses is contrary to longstanding precedent. See *People v Hunter*, 370 Mich 262, 269-270; 121 NW2d 442 (1963); *People v Monroe*, 85 Mich App 110, 112; 270 NW2d 655 (1978); *People v Blondia*, 69 Mich App 554, 557; 245 NW2d 130 (1976). It is also not permitted by MCR 2.513(K). However, the trial court did not commit plain error because the trial court's instructions did not infringe on defendant's right to a fair and impartial jury. The trial court instructed the jury that pre-deliberations could only occur when all jurors were present and they were in the jury room. The trial court made it clear that the jurors could not discuss the case in the hallway, at home, or over the phone. Further, the trial court instructed the jurors to "keep an open mind" and do not "start deciding things today." The trial court told the jurors that they might lean one way and then change their minds, so it is important to gather all the evidence first. The trial court also instructed the jury to make decisions based only on the evidence presented in the courtroom. Finally, there was no indication that the jurors engaged in pre-deliberation discussions. Defendant argues that it is a misconception to think that jurors will actually follow the trial court's instructions to keep all discussions tentative until formal deliberations have begun. However, it is a well-settled principle that jurors are presumed to follow the trial court's instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). When viewed as whole, the trial court's instructions sufficiently protected defendant's right to have his case decided by a fair and impartial jury. See *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006) (stating that this Court "examines the instructions as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried."). Defendant was unable to show how the trial court's instruction prejudiced him.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Kurtis T. Wilder
/s/ Donald S. Owens